No. 89-292

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ESTATE OF JACK GILPIN,
Petitioner,
v.
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respoindents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF OPPOSITION

The opinions below and the basis for this Court's jurisdiction are correctly described in the petition for a writ of *certiorari*. Pet. 2.

STATEMENT OF THE CASE

This action was brought by nine employees of the State of Illinois who work in a collective bargaining unit represented by Local 2000, American Federation of State, County and Municipal Employees ("AFSCME" or "the Union") and who are required, under the applicable "fair share" fee agreement, to make fee payments in lieu of union dues to their exclusive bargaining representative.

In September 1985, after AFSCME had notified the affected employees that the fair share fee for the 1985-86

period would equal 90% of union dues, and had provided a brief explanation of how that percentage was determined, the State began making fair share fee payroll deductions. In response, the plaintiffs filed this suit challenging the fee program. Promptly thereafter, the plaintiffs moved for a preliminary injunction against the collection of fair share fees and for certification of a class of all State employees paying fees to AFSCME. The district court denied both motions. Pet. App. 2a.

The parties next filed cross-motions for summary judgment on the validity of AFSCME's 1985 fair share fee notice. The district court concluded that the 1985 notice did not contain sufficient information to meet the requirements of this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (which had issued after that notice had been prepared and distributed). That court also concluded that AFSCME's internal procedure through which fee payers could challenge the amount of the fair share fee was inadequate under *Hudson*. The district court found, however, that the Union's provision for escrowing fair share fees paid by employees who challenge the fee's amount was adequate under *Hudson*. Pet. App. 19a-22a.

In April 1986, just after the *Hudson* decision issued, and while the summary judgment motions described above were *sub judice*, AFSCME issued its 1986 fair share fee notice to fee payers. This ten page notice explained the basis for the 1986-87 fee in detail, and was mailed to each fee payer at his/her home. In addition to explaining the basis for the fee, which was set at 96% of dues, the 1986 notice informed fee payers of their right to challenge the amount of the fee before a neutral arbitrator. At the same time, AFSCME scheduled an arbitration covering all challenges filed to the basis for, or the amount of, the 1985-86 fee, the 1986-87 fee, or both. *See* Appellants' Court of Appeals Appendix in *Gilpin et al. v. AFSCME*, 7th Cir. No. 88-2441, App. B-56-67, Appellees' Court of Appeals Appendix, D-22-30.

Based on the post-*Hudson* changes in its objection procedures, AFSCME requested the district court to reconsider its summary judgment ruling. On reconsideration, the district court found the 1986 fair share fee notice legally proper in every respect but one; that court concluded that while AFSCME's arbitration procedure itself is adequate, the fair share fee notice should have contained more detail on how the arbitration of challenges would be conducted. Pet. App. 25a-27a.

In June 1987, AFSCME issued a fair share fee notice covering the 1987-88 period and incorporating all the legal requirements set down by the district court. The district court then entered judgment for the defendants. In so doing, that court concluded that the defects in AFSCME's 1985 and 1986 fair share fee notices did not harm the plaintiffs because challenges to the fees had in fact been filed, an arbitrator had in fact reviewed the fee calculations for the 1985-86 and the 1986-87 years, and the Union had undertaken to accord the benefit of the slight revision ordered by the arbitrator to the plaintiffs. The district court found, too, that AFSCME's 1987 fair share fee notice meets the *Hudson* requirements. Pet. App. 3a-4a.

The plaintiffs appealed the district court's decision, challenging the denial of a preliminary injunction and of class certification, the district court's conclusion that AFSCME's 1987 notice meets the requirements stated in *Hudson*, and the district court's refusal to require repayment, with interest, of *all* fair share fees collected since 1985. The court of appeals dismissed the preliminary injunction issue as moot, and affirmed the district court in all other respects. Pet. App. 4a.

ARGUMENT

The *certiorari* petition makes a single legal claim: subsequent to the issuance of the court of appeals' decision, this case has become moot and this Court should, on mootness grounds, vacate that decision. Pet. 4-6. That claim is entirely without substance.

We show first that this case is *not* in fact moot. Given the *certiorari* petition's theory, that demonstration requires that the petition be denied.

We then show that in cases that become moot after a court of appeals decision and that do *not* raise any issue warranting this Court's review, the proper course is to deny the *certiorari* petition, leaving the court of appeals' decision standing. Even on the assumption that this case is moot, that demonstration, too, requires that the *certiorari* petition here be denied.

1. a. In arguing that this case is moot the *certiorari* petition focuses solely on the claims of the lead named plaintiff, Jack Gilpin. The claims of the other named plaintiffs and of the class the plaintiffs sought to represent are simply *ignored.* The petition asserts that Mr. Gilpin died subsequent to issuance of the court of appeals decision, thereby mooting the claim for injunctive relief, and that, after the decision below, AFSCME sent Mr. Gilpin a "check[] in [an] amount[] that exceeded the amount of restitution petitioner had planned to request this Court to order thereby mooting the restitution claim." Pet. 4-5.

For the moment, we too will ignore the claims of the other named plaintiffs—who, so far as the petition shows, are alive and continue to work for the State and to be covered by fair share fee agreements—and of the proposed class, and show that the *certiorari* petition fails to demonstrate that eevn Mr. Glipin's claims are moot.

In the courts below, Mr. Gilpin requested "full restitution, with interest, of all fair share fees deducted since

September 1985, [and] the award of nominal damages, ..." Appellants' Court of Appeals Brief in *Gilpin, et al. v. AFSCME*, 7th Cir. No. 88-2441, at p. 39.[1] This restitution demand, translated into dollars and cents, equals $788.03.[2]

In the district court, as we have noted, AFSCME had obligated itself to accord the named plaintiffs in this case any benefits realized by employees who filed an arbitration challenge to the correctness of the agency fee calculation during the pendency of this case in that court. *See* pp. 2-3, *supra*.[3] Based on this undertaking, in July

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[1] The claim "for full restitution, with interest, of all fair share fees deducted since September, 1985," Appellants' Court of Appeals Brief 39, is the sum of two slightly different theories advanced by the plaintiffs in the court below. Based on the district court's finding that AFSCME's 1985 and 1986 notices were inadequate, the plaintiffs maintained that they were entitled to "restitution, with interest, of all fair share fees deducted between September, 1985 and June 30, 1987." *Id.* at 33. Based on their contention that the 1987 notice was also inadequate, the plaintiffs maintained that "the collections that occurred during the 1987-88 year were also illegal and should be return[ed], with interest, to all nonunion employees," and that "a permanent injunction should be issued against defendants enjoining all fair share fee deductions. . . ." *Id.* at 38.

[2] AFSCME's records reflect that $648.90 in fair share fees were deducted from Mr. Gilpin's pay beginning September 1985 and ending on his death in 1988. In light of Mr. Gilpin's pending lawsuit, AFSCME deposited all of these fees in an interest-bearing escrow account. At the time the funds were freed from that account earlier this year, the deductions from Mr. Gilpin's pay, together with interest, amounted to $788.03.

[3] As it turned out, this promise encompassed three fee years—1985-86, 1986-87 and 1987-88. Ruling on challenges to the 1985-86 fee, the arbitrator found that while AFSCME had set the fair share fee at 90% of union dues, the Union's fair share expenditures in fact entitled it to 95% of dues. Pet. App. 3a. Ruling on challenges to the 1986-87 fee, the arbitrator found that while AFSCME had set the fee equal to 96% of union dues, in fact the proper figure was 95% and ordered the Union to return the excess charge. *Id.* No employee challenged AFSCME's fee calculation for 1987-88.

1989, AFSCME refunded to each of the plaintiffs the 1% of 1986-87 fees found in excess of the proper fair share fee amount in the arbitration proceeding. In addition, to preclude the need for further litigation with the plaintiffs, AFSCME refunded the entire fee for 1987-88; a year in which this case was still pending in the district court, but in which no employee took a fee challenge to arbitration. Thus, AFSCME sent Mr. Gilpin a check for $233.78, representing 1% of the 1986-87 fee and 100% of the 1987-88 fee, plus interest.

From the foregoing, two points are clear beyond dispute:

First, this case was *not* moot when the court of appeals issued its decision. At that time, AFSCME had not yet refunded any of Mr. Gilpin's fair share fee payments.

Second, this case is *not* presently moot. The AFSCME payment of $233.78 to Mr. Gilpin is less than one third of the $788.03 Mr. Gilpin demanded as restitution in the courts below.[4]

b. What we have said thus far is dispositive with respect to the *certiorari* petition's assertion of mootness. However, for the sake of completeness we add that the

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[4] The *certiorari* petition does, as we have noted, assert that AFSCME's recent payment to the plaintiffs "exceeded the amount of restitution petitioner had planned to request this Court to order." Pet. 5. The footnote to this passage supports this assertion by theorizing that AFSCME's $233.78 payment to Mr. Gilpin represents 120% of the 1986-87 fee. *Id.* n.8. As we explain in text, this theory rests on a complete misunderstanding of the basis on which AFSCME proceeded.

Equally to the point, all that the petition claims is that AFSCME's payment is more than the petitioner "planned to request" for the *1986-86* fair share fee period. On that assumption, it remains true that AFSCME has not made restitution on fees paid by Mr. Gilpin from September 1985 through June 1986 and from July 1987 until his death in 1988. And there is nothing in the petition suggesting that the restitution claim for these fees has been abandoned. Thus, accepting the *certiorari* petition's theory Mr. Gilpin's case is *not* moot.

petition, in its rush to mootness, too quickly dismisses the claims of Mr. Gilpin's fellow named plaintiffs and of the class the named plaintiffs sought to represent.

The *certiorari* petition without any ceremony—and without a trace of concern—dispatches the other named plaintiffs and their legal claims in a footnote to the statement of parties. That footnote tersely asserts that in light of this Court's recent decision in *Torres v. Oakland Scavenger Co.*, —— U.S. ——, 108 S.Ct. 2405 (1988), and *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988) (applying *Torres*), the petition is filed only on behalf of Mr. Gilpin's estate "whose decedent was, in retrospect, the only appellant in the court of appeals." Pet. ii n.1. The named plaintiffs and the class deserve better.

The court of appeals proceeded on the assumption that all nine of the named plaintiffs had properly appealed and were before that court. Pet. App. 4a. Presumably what has now led the *certiorari* petition to state that "in retrospect" the other eight plaintiffs were not before the court below is the fact that the notice of appeal from the district court states that "Jack Gilpin, *et al.*, Plaintiffs above named, hereby appeal," and does not in the most literal terms conform to *Torres* by setting out the names of each of the other individual plaintiffs. But there is a *substantial* argument that the phrasing of the notice of appeal suffices to preserve all the named plaintiffs' legal claims and that those legal claims are live claims. *See Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989).[5]

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[5] Unlike the *Torres* appeal notice which named 15 out of the 16 plaintiffs in that case, the notice in this case refers to "Jack Gilpin, *et al.*, Plaintiffs above named, ..." On a fair reading, this designation is clearly intended as shorthand for the full caption of all plaintiffs and defendants. Moreover, the notice of appeal specifically states that denial of class certification is being appealed, and since the same relief was requested on behalf of the named plaintiffs and the proposed class, this reinforces the conclusion that an

That being so, the blithe assertion—in a legal document signed by the named plaintiffs' own legal counsel—that their claims were not properly preserved is incomprehensible.

The *certiorari* petition does *not* offer any explanation at all of what has become of the proposed class. The notice of appeal, however, quite clearly states that "the denial of class certification" is being appealed. And, the law is plain that even if, contrary to our showing above, Mr. Gilpin's claims were moot, that does not mean the class certification issue is moot. "[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (footnote omitted). Moreover, *Torres* expressly leaves open the possibility that named plaintiffs left off a notice of appeal have the right to continue in the suit as members of a proposed class, 109 S.Ct. at 2409 n.3, and thus the right to intervene to petition for review of the class certification denial, *see United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-395 (1977). The *certiorari* petition here could therefore have properly sought review of the lower court decisions denying class certification.

Thus, the class certification issue is *not* moot, and this case is *not* moot.

2. The *certiorari* petition does not suggest—much less demonstrate—that this case raises any substantive legal issue that warants the exercise of this Court's discretionary authority to review the decision below.[6] Nor does the

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appeal on behalf of all plaintiffs was taken. And, under *Ford v. Nicks, supra*, the test is whether "the context shows that *'et al.'* was intended to refer to all the others." 866 F.2d at 870. *See also King v. Atasco, Inc.*, 861 F.2d 438, 442-43 (5th Cir. 1988).

[6] The closest the petition comes to asserting that the issues here are cert-worthy is a footnote citing *Tierney v. City of Toledo*, 824

petition assert that this case was moot when the court of appeals ruled.

Given these omissions, we submit that even if the dispute presented to the court of appeals had in fact become moot after its decision, the petition for *certiorari* should be denied. *See, e.g., Velsicol Chemical Corp. v. United States*, 435 U.S. 942 (1978) (denying *certiorari* where parties agree that a case became moot after the court of appeals decision)[7]; *Bowen v. American Hospital*

F.2d 1497 (6th Cir. 1987), and *Gibney v. Toledo Federation of Teachers*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988), and asserting that "[t]he court of appeals' denial of restitution conflicts with the allowance of restitution by the Sixth Circuit and the Ohio Supreme Court when the required *Hudson* safeguards are absent." Pet. 4 n.7. There is no such conflict.

The union fair share fee notice and hearing procedures in *Tierney* and *Gibney* were found to have *substantial constitutional defects*. The procedures here, in contrast, were found to have only minor defects that were cured by arbitration of AFSCME's fair share fee calculation and by the Union's issuance of an adequate notice to fee payers. Pet. App. 3a. In these very different circumstances, the denial of a restitution remedy by the courts below is not contrary to anything said or done in *Tierney* and *Gibney*.

Moreover, the decision of the court below is entirely consistent with this Court's direction that "[i]n determining what remedy will be appropriate . . ., the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977) (footnote omitted).

[7] The *certiorari* petition in *Velsicol Chemical Corp. v. United States, supra*, argued that the case had become moot so that the decision below should be vacated, and alternatively that, if the case were not moot, it presented issues worthy of resolution on *certiorari*. Petition for a Writ of Certiorari, Supreme Court No. 77-900, pp. 5-12. In responding to the petition, the United States granted *arguendo* that the dispute had become moot, but maintained that since the case was *not* otherwise worthy of review by this Court, the proper course was for the Court to deny the petition. Brief for the United States in Opposition, Supreme Court No. 77-900, pp. 4-8. And, of course, the Court did deny the petition.

Ass'n, 476 U.S. 610, 617 n.5 (1986) (explaining the denial of *certiorari* in *Infant Doe v. Bloomington Hospital*, 464 U.S. 961 (1983) (a case in which the petitioner died after the decision below and before this Court ruled on the *certiorari* petition).[8]

Because the Federal courts' Artcile III authority extends only to live cases and controversies, as the *certiorari* petition notes, counsel have an obligation to advise the Court "[w]hen a development *after this Court grants certiorari* or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy . . . ." *Tiverton Bd. of License Commissioners v. Patore*, 469 U.S. 238, 240 (1985) (emphasis added).

But it does *not* follow that counsel should be encouraged to bother the Court with *certiorari* petitions that grow out of court of appeals' decisions that do *not* raise any issue warranting plenary review, simply to advise the Court that the case happens to have become moot within ninety days of the decision below.

At best, entertaining such petitions is a waste of the Court's time since by hypothesis the underlying issues would not be worthy of consideration on *certiorari* even if an Article III controversy were present. And, at worst,

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[8] As the cited cases show, the rule of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which requires the vacation of a district court judgment in a case that becomes moot while pending in a court of appeals, has *no* application to a case that becomes moot while a *certiorari* petition is pending. When a case becomes moot while on appeal, the district court decision has not been subject to the appellate review *provided as a matter of right.*

Again, as the cited cases show, this Court's practice of vacating lower court decisions in cases that become moot after a writ of *certiorari* has issued, but before decision, relied on in the petition here, Pet. 4 (citing *Deakins v. Monaghan*, 484 U.S. 193 (1988)), does not extend to pending *certiorari* petitions. *See also Mintzes v. Buchanon*, 471 U.S. 154 (1985) (vacating order granting *certiorari* and dismissing petition upon death of the petitioner).

as this case indicates, a rule encouraging parties to file such petitions would needlessly increase the Court's workload by inviting losing litigants who have a continuing interest in a legal issue, who are dissatisfied with a lower court decision, and who lack confidence in their chances of securing a writ of *certiorari*, to allege mootness—with or without an adequate basis—in an attempt to eliminate an otherwise unassailable court of appeals opinion.[9]

Given the petitioners' total failure to raise any substantive issue worthy of review on *certiorari*, and the weakness of the mootness claim, the Court's usual practice of denying *certiorari* in cases such as this is particularly appropriate here.

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[9] To be sure, when a case that *would otherwise have been worthy of plenary consideration* becomes moot prior to the Court's ruling on a *certiorari* petition, the Court's practice is to grant the writ and vacate the lower court decision. The petition here, Pet. 4 & 6, cites two such cases: *Onwuasoanya v. United States*, —— U.S. ——, 109 S.Ct. 299 (1988), and *Honig v. Students of California for the Blind*, 471 U.S. 148 (1985).

In *Onwuasoanya v. United States, supra*, the United States in effect confessed error and requested that the court of appeals opinion be vacated. Memorandum for the United States in Supreme Court No. 88-28, pp. 3 & 5. *See also Floyd v. United States*, 860 F.2d 999, 1006-07 (10th Cir. 1988) (questioning the lower court decision in *Onwuasoanya*). In *Honig*, the underlying questions were of sufficient moment that three Justices dissented from the summary disposition of the case as moot. 471 U.S. at 150-152. *See also Students of California School for the Blind v. Honig*, 745 F.2d 582 (9th Cir. 1984) (dissenting opinion of six circuit judges who favored granting rehearing *en banc*).

For the reasons stated in the text, it would be unsound to treat substantial *certiorari* petitions and insubstantial petitions as a single class for mootness purposes.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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